IN THE SUPREME COURT OF THE UNITED STATES

No. 04-104 (20)

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-105 (19)

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LODGING

LODGING
Estimate of Number of Cases Possibly Impacted by the Blakely Decision

---

[See Attached Service Lists]

Paul D. Clement
Acting Solicitor General
Counsel of Record

October 8, 2004

M E M O R A N D U M

To: Tim McGrath

From: Lou Reedt

Date: July 20, 2004

Subject: Estimate of Number of Cases Possibly Impacted by the Blakely Decision

The decision in Blakely v. Washington has the potential to impact both the court workload and defendant sentences. This estimate below uses the FY02 Commission dataset to identify the number of cases having sentencing enhancements that might be affected by the Blakely decision. At this time, it is not possible to estimate the magnitude of the impact, if any, on offender sentences however, data is being collected to address this question.

It is difficult to estimate with certainty the potential number of defendants affected by the decision in Blakely as well as what the effect might mean for the court workload. While a large number of cases may, at first blush, appear to be exposed to a Blakely effect, it is likely that far fewer cases will actually be affected because most cases result in pleas accompanied by plea agreements which may contain stipulations of facts, such as quantity of drugs or dollar loss amounts, applicability of guideline enhancements, or Blakely waivers. Consequently early estimates may be substantially over inclusive.

As a cautionary note, during this initial unsettled period it should be expected that the new uncertainty may affect the workload of the court community. It can be expected that in the longer term, either solutions to 'fix' the problem will be employed where available and where not available, a return to preguideline pleading practices (which would be consistent with current state court practice) will return. Consequently making long term estimates on the currently available information may substantially overestimate the ultimate impact.

In FY02 64,366 cases were sentenced under the federal sentencing guidelines. Of these, we have complete sentencing information on 52,312. The following analysis is limited to these 52,312 cases. An initial estimate of the possible impact identified all cases having a chapter 2 or 3 sentence enhancement, an upward departure, or a cross reference application.[1] Of the 52,312 cases with complete sentencing data, 44.2 percent (n=23,138) met any of these criteria. A substantial

---

[1]**Guidelines 2L1.1, 2L1.2, 2L2.1, and 2L2.2 contain an enhancement if prior convictions are present. This specific offense characteristic was not used to identify cases for possible Blakely effect.**

proportion of the remaining 29,174 cases involved drug trafficking offenses (n=17,430). The proportion of these remaining cases potentially exposed to a Blakely effect because the offenders base offense level was increased beyond the quantity specified in the plea or indictment may be estimated by eliminating from consideration those offenders who had an applicable mandatory minimum and a base offense level that identically corresponds to the relevant mandatory minimum (for this analysis, cases were identified in which there was a mandatory minimum of 5 or10 years and a corresponding base offense level of 26 or 32, respectively). Using this criterion, 4,335 cases will not be affected. Additionally, it is understood that in border states many drug cases with non citizen defendants involve only the quantity of drugs found on the person when arrested - i.e., there is no additional drug quantity found through relevant conduct to increase the drug quantity above indictment/plea levels. Eliminating these cases removes an additional 2,257 cases from consideration. The remaining drug cases (n=10,838) are then added to the previous estimate of cases possibly affected resulting in an estimated total of 33,976 cases (65.0% of the 52,312 cases sentenced in FY02 with complete sentencing information available) potentially affected by Blakely.

As stated earlier, this estimate may substantially overstate the effect of the Blakely decision on the workload of the court community. In FY02, 97.1 percent of cases sentenced under the guidelines were the result of plea agreements. Of the 33,976 cases estimated above, 96.5 percent pled guilty. Two forms that a plea may take are relevant for consideration at this time: 1) pleas pursuant to Rule 11(c)(1)(c) that bind the court to a specific sentence; and 2) plea agreements fully stipulating the relevant sentencing factors in the case. For both of these forms of plea agreement, it is expected that the Blakely decision will have minimal or no effect. Current limitations in data collection do not include information specifying the form of the plea agreement, however the availability of these forms of plea agreement suggests that the above estimate overstates the actual impact.

Further reducing the number of possibly affected cases is that in federal circuits in which the federal guideline sentencing scheme is found to be constitutional there will be no impact whether the defendant is convicted at trial or regardless of what form a plea agreement may take. Until all circuit courts have ruled however the extent to which the previous estimate can be reduced cannot be determined. In circuits in which the guidelines are found to be unconstitutional, the proportion of defendants choosing to go to trial may increase above current levels but there is no evidence to suggest that the proportion of trial cases will not continue to account for a relatively small proportion of federal sentencings. The preguideline trial rate in federal cases was 12.6 percent (1988). While greater than the current trial rate of 3.8 percent, this figure indicates that trials, even absent the presence of the federal sentencing guidelines, accounted for a small percentage of the federal criminal court workload.[2] That there is a relatively small proportion of defendants choosing to go to trial is consistent with the experience of state courts. It has recently been reported that the trial rate in 22

---

[2]This data on federal sentencing was reported in the Sourcebook of Criminal Justice Statistics, 2002, page 421, a Bureau of Justice Statistics publication base on data provided by the Administrative Office of the U.S. Courts. While Sentencing Commission data is available for 2002, it is not available for 1984. For consistency purposes it was determined that this Bureau of Justice Statistic data be used at both time points (1984 and 2002). It is noteworthy that Commission data report a lower trial rate in 2002 (2.9%).

states has declined from eight percent of all court dispositions in 1984 to five percent of all dispositions in 2002.[3]

Finally, it is reasonable to assume that defendants who are cooperating with law enforcement, receiving a departure for providing substantial assistance to authorities under the federal guidelines, would have a greater likelihood of pleading guilty rather than going to trial. Among the estimated 33,976 cases cited above, 22.9 percent (n=7,764) received a departure for substantial assistance. This further lowers the estimated impact of the Blakely decision.

In conclusion, initial estimates of the impact of the Blakely decision on the workload of the federal court community should be viewed with caution. Activities occurring in this period immediately following the decision will likely not represent longer term responses by the field and cause substantial overestimation of the impact. While a large number of cases may, at first blush, appear to be exposed to a Blakely effect, it is likely that far fewer cases will actually be affected because of the availability of 'solutions' (*e.g.*, fully stipulated pleas, fully articulated indictments, waivers of Blakely, etc) in some courts or the likelihood that past practice will repeat itself (*i.e.*, historically high plea rates prior to the advent of the federal sentencing guidelines) in courts where these options are not available.

---

[3]**The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, Compiled by Marc Galanter. Prepared for the Symposium on the Vanishing Trial, sponsored by the Litigation Section of the American Bar Association, San Francisco, California, December 12-14, 1003.**

04-0104
USA (E)
FREDDIE J. BOOKER

GREGORY G. GARRE
HOGAN & HARTSON
COLUMBIA SQUARE
555 THIRTEENTH ST., N.W.
WASHINGTON, DC 20004-1109
202-637-5600
GGGARRE@HHLAW.COM
202-637-5910 (Fax)

THOMAS GOLDSTEIN
GOLDSTEIN & HOWER, P.C.
4607 ASBURY PLACE, N.W.
WASHINGTON, DC 20016
202-237-7543
TGOLDSTEIN@GOLDSTEINHOWE.COM
202-237-7542 (Fax)

STEPHEN THOMAS KAISER
CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20006-1801
212-225-2000
212-225-3999 (Fax)

PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVE., N.W.
WASHINGTON, DC 20036
202-588-0302
PKAMENAR@WLF.ORG
202-588-0386 (Fax)

T. CHRISTOPHER KELLY
KELLY & HABERMEHL, P.C.
145 WEST WILSON STREET
MADISON, WI 53703
608-255-9491
KELLYHABERMEHL@EARTHLINK.NET
608-255-6137 (Fax)

04-0104
USA (E)
FREDDIE J. BOOKER

THOMAS F. LIOTTI
600 OLD COUNTRY RD.
SUITE 530
GARDEN CITY, NY 11530
516-794-4700
516-794-2816 (Fax)

JOHN S. MARTIN
DEBEVOISE & PLIMPTON LLP
919 THIRD AVE.
NEW YORK, NY 10022
212-909-6202
JSMARTIN@DEBEVOISE.COM

BRUCE M. MERRILL
225 COMMERICAL STREET
SUITE 401
PORTLAND, ME 04101
207-775-3333
MAINELAW@MAINE.RR.COM
207-775-2166 (Fax)

DOUGLAS A. MORRIS
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET
SUITE 629
DALLAS, TX 75202
214-767-2746
214-767-2886 (Fax)

DAVID M. PORTER
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
801 I ST., 3RD FLOOR
SACRAMENTO, CA 95814
916-498-5700
916-498-5710 (Fax)

04-0104
USA (E)
FREDDIE J. BOOKER

FRANCES H. PRATT
OFFICE FEDERAL PUBLIC DEFENDER
FOR EASTERN DISTRICT OF VIRGINIA
1650 KING ST., STE. 500
ALEXANDRIA, VA 22314
703-600-0815
FRAN_PRATT@FD.ORG
703-600-0880 (Fax)

MARY PRICE
FAMILIES AGAINST MANDATORY MINIMUMS
1612 K ST., N.W.
STE. 700
WASHINGTON, DC 20006
202-822-6700
202-822-6704 (Fax)

JAMES K. ROBINSON
CADWALADER, WICKERSHAM & TAFT LLP
1201 F ST., N.W.
WASHINGTON, DC 20004
202-862-2200
202-862-2400 (Fax)

ROSEMARY CURRAN SCAPICCHIO
LAW OFFICE OF
ROSEMARY CURRAN SCAPICCHIO
FOUR LONGFELLOW PLACE
SUITE 3703
BOSTON, MA 02114
617-263-7400
SCAPICCHIO_ATTORNEY@YAHOO.COM
617-742-5761 (Fax)

04-0104
USA (E)
FREDDIE J. BOOKER

DEAN A. STRANG
FEDERAL DEFENDER SERVICES
OF WISCONSIN, INC.
517 EAST WISCONSIN AVE.
SUITE 182
MILWAUKEE, WI 53202
414-221-9900
414-221-9901 (Fax)

CHARLES R. TETZLAFF
UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
202-502-4500
202-502-4699 (Fax)

DONALD B. VERRILLI, JR.
ELAINE J. GOLDENBERG
JENNER & BLOCK LLP
601 THIRTEENTH ST., N.W.
WASHINGTON, DC 20005
202-639-6000

04-0105
USA (E)
DUCAN FANFAN

PAUL A. ENGELMAYER
WILMER CUTLER PICKERING HALE & DORR LLP
399 PARK AVE.
NEW YORK, NY 10022
212-230-8800
PAUL.ENGELMAYER@WILMER.COM

THOMAS C. GOLDSTEIN
GOLDSTEIN & HOWE, P.C.
4607 ASBURY PLACE, N.W.
WASHINGTON, DC 20016
202-237-7543
TGOLDSTEIN@GOLDSTEINHOWE.COM
202-237-7542 (Fax)

ROBERT N. HOCHMAN
SIDLEY AUSTIN & BROWN & WOOD
BANK ONE PLAZA
10 SOUTH DEARBORN ST.
CHICAGO, IL 60603
312-853-7000

T. CHRISTOPHER KELLY
KELLY & HABERMEHL, P.C.
145 WEST WILSON STREET
MADISON, WI 53703
608-255-9491
KELLYHABERMEHL@EARTHLINK.NET
608-255-6137 (Fax)

SCOTT D. MARCUS
SIDLEY AUSTIN BROWN & WOOD LLP
555 WEST 5TH ST.
40TH FLOOR
LOS ANGELES, CA 90013
213-896-6600

04-0105
USA (E)
DUCAN FANFAN

SCOTT D. MARCUS
SIDLEY AUSTIN BROWN & WOOD LLP
555 WEST 5TH ST.
40TH FLOOR
LOS ANGELES, CA 90013
213-896-6600

BRUCE M. MERRILL
BRUCE M. MERRILL, P.A.
225 COMMERCIAL STREET
SUITE 401
PORTLAND, ME 04101
207-775-3333
MAINELAW@MAINE.RR.COM
207-775-2166 (Fax)

DOUGLAS A. MORRIS
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET
SUITE 629
DALLAS, TX 75202
214-767-2746
214-767-2886 (Fax)

CARTER G. PHILLIPS
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K STREET, N.W.
WASHINGTON, DC 20005-1401
202-736-8291
CPHILLIPS@SIDLEY.COM
202-736-8711 (Fax)

DAVID M. PORTER
NATIONAL ASSOC. CRIMINAL DEFENSE LAWYERS
1150 18TH ST., N.W.
SUITE 950
WASHINGTON, DC 20036
202-872-8600
202-872-8690 (Fax)

04-0105
USA (E)
DUCAN FANFAN

ROSEMARY CURRAN SCAPICCHIO
LAW OFFICE OF
ROSEMARY CURRAN SCAPICCHIO
FOUR LONGFELLOW PLACE
STE. 3703
BOSTON, MA 02114
617-263-7400
SCAPICCHIO_ATTORNEY@YAHOO.COM
617-742-5761 (Fax,

DEAN A. STRANG
FEDERAL EFENDER SERVICES
OF WISCONSIN, INC.
517 EAST WISCONSIN AVE.
SUITE 182
MILWAUKEE, WI 53202
414-221-9900
414-221-9901 (Fax)

MARTIN G. WEINBERG
MARTIN G. WEINBERG P.C.
20 PARK PLAZA
BOSTON, MA 02116
617-227-3700